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by
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Introduction

Based in part on models we developed in two recent articles,[1] we propose here the creation of a new category of Fourth Amendment[2] violations. Current doctrine divides Fourth Amendment violations into two categories for the purpose of deciding whether to apply the exclusionary rule as a remedy. One category contains "good-faith" violations of the Fourth Amendment, which require no remedy.[3] All other violations fall into the second category; because good faith is missing in this category, the exclusionary rule looms as a potential

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1. *See* George C. Thomas III & Barry S. Pollack, *Saving Rights From A Remedy: A Societal View Of The Fourth Amendment*, 73 B.U. L. REV. 147 (1993) [hereinafter Thomas & Pollack, *Saving Rights*]; George C. Thomas III & Barry S. Pollack, *Rethinking Guilt, Juries, and Jeopardy*, 91 MICH. L. REV. 1 (1992) [hereinafter Thomas & Pollack, *Rethinking Guilt*].

2. The Fourth Amendment provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.

3. *See* Illinois v. Krull, 480 U.S. 340 (1987) (refusing to apply the exclusionary rule when evidence found in good-faith reliance on a defective statute); United States v. Leon, 468 U.S. 897 (1984) (same; good-faith reliance on a defective warrant).

remedy that will deny the government certain uses of evidence seized in violation of the Fourth Amendment.

This typology is too crude; the general category of "all other violations" contains a wide range of government conduct and culpability. As presently constituted, the general category would include a police officer's mistake about whether he had probable cause to move a stereo a few inches to examine its serial number[4] as well as a warrantless search of a house by police officers who lacked probable cause and who, in the bargain, ignored both the owner's demands to cease and requests by the owner's counsel to be admitted to the premises.[5] The officers' culpability and the scope of the violation are obviously far greater in the second case than in the first. Yet these cases are treated the same for purposes of applying the exclusionary rule, which is to say that in both cases the evidence found is excluded for some purposes, but not for others.

When the exclusionary rule applies, it denies the government the use of evidence by excluding it from consideration at trial. But, as discussed at greater length later in the paper,[6] the exclusionary rule is limited in four ways: as to (1) the class of persons that can benefit from exclusion (traditionally called "standing"), (2) the type of proceedings that may serve as an occasion for suppression, (3) the class of evidence sufficiently related to the violation to deserve suppression, and (4) the type of use to be made of the evidence at trial. Thus, no matter how flagrant the violation, evidence found as a result may be admissible under these limitations on the exclusionary rule.

To put these limitations in a practical perspective, consider a case in which the police stop a car, search it in violation of the Fourth Amendment, and find gambling devices in the trunk. The amalgam of limitations on the exclusionary rule would fit together as follows. The gambling devices, though seized in violation of the car owner's Fourth Amendment rights, may be introduced in a criminal case against defendants who were mere passengers in the car when the search took place.[7] The same evidence may be used in a civil proceeding to confis-

4. *See* Arizona v. Hicks, 480 U.S. 321 (1987).

5. The facts are roughly those in Mapp v. Ohio, 367 U.S. 643 (1961). It is not clear from the *Mapp* opinion that the officers lacked probable cause, but they did not find what they sought. *Id.* at 668-69. We will discuss the implications of the facts in *Mapp* more fully *infra* notes 65-81 and accompanying text.

6. *See infra* Part III.

7. The use of "mere passengers" is meant to indicate passengers who have no privacy interest in the car beyond their status as passengers. *See* Rakas v. Illinois, 439 U.S. 128, 148

cate the devices.[8] It may be used to obtain an indictment against the owner of the car whose Fourth Amendment rights were violated.[9] It may also be used to impeach the owner's testimony if she takes the stand at her criminal trial.[10] Finally, the owner's confession, made several days later, would likely be admissible even though she would not have confessed in the absence of the seized evidence.[11]

These limitations on the exclusionary rule may make sense when a non-flagrant Fourth Amendment violation produces the evidence, but they should be re-examined when the state actor finds evidence by means of bad-faith conduct.[12] In effect, the Court had its "thumb on the scales" when it created a good-faith exception to the exclusionary rule while ignoring the consequences of bad-faith violations. To rebalance the scales, a bad-faith category of Fourth Amendment violations should be established at the other end of the spectrum from the good-faith violations. The Fourth Amendment, according to this view, would consist of three types of violations: good-faith violations that require no remedy, intermediate violations remedied by the current version of the exclusionary rule, and bad-faith violations that require a broader, less constrained exclusionary rule.

This Article contains four parts. Part I sketches a general justification for our assertion that a bad-faith violation requires a broader exclusionary rule. Part II explores how to determine when police are

(1978). Presumably, the car owner's spouse or children would have a privacy interest sufficient to confer standing on them. *See id.* at 167 (White, J., dissenting).

8. *See* One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 701 (1965) (dicta).

9. *See* United States v. Calandra, 414 U.S. 338 (1974) (pre-indictment grand jury). The evidence can be used in other non-criminal contexts as well. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032 (1984) (deportation hearing); United States v. Janis, 428 U.S. 433 (1976) (civil tax prosecution).

10. *See* United States v. Havens, 446 U.S. 620 (1980) (approving use of illegally-seized evidence to impeach the defendant). Illegally-seized evidence may not, however, be used to impeach witnesses other than the defendant. *See* James v. Illinois, 493 U.S. 307 (1990).

11. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

12. The term "bad-faith search" has been used to identify situations in which the motives of the police officer create a Fourth Amendment violation when none would otherwise have been found. *See* John M. Burkoff, *Bad Faith Searches*, 57 N.Y.U. L. REV. 70, 89-92 (1982) (arguing for a "bad-faith" doctrine that turns an otherwise permissible search incident to arrest into a violation if the officer used the arrest as a pretext to make the search). *But cf.* Scott v. United States, 436 U.S. 128, 135-37 (1978) (rejecting this concept); 1 WAYNE R. LAFAVE, SEARCH AND SEIZURE 80-97 (2d ed., 1987) (generally approving of *Scott*). We use the term "bad faith" quite differently. Although we believe that motive is a relevant factor in suppression determinations, we do not address the question of whether an improper motive can turn an otherwise legal search into an illegal one. Rather, we begin with a Fourth Amendment violation and ask whether it is sufficiently flagrant that courts should consider applying an expanded exclusionary rule.

acting in bad faith. Part III analyzes each of the four current limitations on the exclusionary rule and examines whether that limitation should apply to evidence discovered by bad-faith conduct. Part IV discusses the procedure by which courts can make the bad-faith determination.

I. Correlation Between Violation and Remedy

In an early draft of this Article, we treated as almost self-evident the general principle that the scope of available remedies should vary directly with the wrongfulness of Fourth Amendment violations. In other words, the more wrongful the violation, the greater the remedy should be. This intuition was based partly on assumptions about deterrence; the more wrongful the violation, the more society would want to deter it and, therefore, the greater the cost of the violation should be. A second aspect of our intuition was that the very integrity of the justice system is undermined when evidence seized by egregiously wrongful conduct can be used to obtain judgments. Our intuition was also based—quite controversially, it turned out—on the notion that an expanded exclusionary rule simply treats the government as wrongdoer in the same way that the government treats citizens who violate the law. On this view, the more wrongful the constitutional violation, the greater the penalty should be, with the exclusionary rule being viewed as the most efficacious method of penalizing the government. Because this proportionality principle was challenged by several readers, and because it is the broadest justification for our thesis, we begin with it.

A. The Kantian Proportionality Principle

Though we will return to the question of what constitutes a bad-faith Fourth Amendment violation, we begin by describing a paradigm case: an officer conducts a detailed search of an entire house, based on nothing more than a hunch, and seizes business records. Here the officer acted knowingly, made a severe intrusion into the homeowner's privacy, and damaged the homeowner by seizing business records.

Should the government's penalty correspond in some fashion to the wrongfulness of its Fourth Amendment violation? The wrongfulness of criminal violations by citizens affects the degree of punishment

meted out to them.[13] Similarly, it is beyond peradventure that the degree of harm caused by tortfeasors affects their civil liability. Indeed, the notion that a greater harm or wrong requires a greater penalty underlies both Jeremy Bentham's utilitarianism and Immanuel Kant's retributive theory of justice.[14] The utilitarian justification of greater penalties is based on notions of deterrence, and will be discussed shortly. Kant's justification is broader. He posited that retribution was the mechanism by which society repaired the damage to the fabric of justice caused by the wrong. Thus, greater penalties for greater harms are not merely defensible or useful; they are necessary.[15] Kant's classic and chilling example assumed that inhabitants of an island had "decided to separate and disperse themselves around the world." Kant argued that they must first execute the "last murderer remaining in prison . . . , so that everyone will duly receive what his actions are worth and so that the bloodguilt thereof will not be fixed on the people because they failed to insist on carrying out the punishment."[16]

The Kantian principle that a greater wrong deserves a greater penalty is ingrained in our culture. Thus, unless one's account of justice distinguishes between individuals and the government, the degree of wrongfulness of government conduct must be relevant to the appropriate response. Plato refused to draw any distinction between the government and the individual when evaluating the actor's morality or justice, contending that the meaning of justice can best be understood by looking at what it means for the government to act justly, for that is "writ large against the sky" for all to see.[17] While this parallel has sometimes been rejected,[18] it has proven more lasting than the oppos-

13. *See, e.g.*, 2 GERALD T. MCFADDEN ET AL., FEDERAL SENTENCING MANUAL § 2F1.1 (1992) (table showing offense level increase based upon amount of loss inflicted); *see also* Barry S. Pollack, Note, *Deserts and Death: Limits on Maximum Punishment*, 44 RUTGERS L. REV. 985, 992-96 (1992) (discussing relationship between harm and penalty).

14. *See* JEREMY BENTHAM, AN INTRODUCTION TO THE PRINCIPLES OF MORALS AND LEGISLATION 181 (Clarendon Press 1907) (1823); IMMANUEL KANT, THE METAPHYSICAL ELEMENTS OF JUSTICE 99-102 (John Ladd trans., 1965); *see also* Pollack, *supra* note 13, at 994 (citing, among others, Jeremy Bentham, and concluding that a correlation between harm and penalty reflects "societal perceptions of opprobrium" and "provides a more coherent and fair system").

15. KANT, *supra* note 14, at 99-102.

16. *Id.* at 102.

17. *See* PLATO, THE REPUBLIC 368-69 (B. Jowett ed., 1941).

18. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 148-50 (Francis B. Randall ed., 1964) (1651) (positing a sovereign against which no claim of injustice could be made).

ing view. For example, Plato's parallel informs a famous passage from Justice Brandeis' dissent in *Olmstead v. United States*[19]:

> Decency, security and liberty alike demand that government officials shall be subjected to the same rules of conduct that are commands to the citizens. In a government of laws, existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy.[20]

We will omit an extended proof that citizens in a free society expect their government to suffer a penalty if it does not abide by the same standards of morality that citizens apply in their own lives. We think we were right that *this* point is almost self-evident. The readers of the early draft did not have difficulty with the appropriateness of some sort of Kantian proportionality principle in the Fourth Amendment context. Rather, they thought the difficulty lay in deciding *how* the government should be punished for its wrongful conduct. Willfully violating the Fourth Amendment is, after all, both a federal crime and a federal tort,[21] and the offending government agents can thus be punished directly and proportionally. These avenues of punishment are, however, both conceptually and practically inadequate.

At a practical level, federal prosecutors bring very few criminal prosecutions against offending government actors, at least in part because the prosecutors are typically protective of the federal officers on whom they depend and are rarely informed of violations by state officers. Moreover, few civil suits are brought. Of those that are brought, few are successful even when flagrant violations are alleged.[22] The imposition of penalties in only a few cases, more or less at random, is inconsistent with a Kantian, desert-based conception of

19. 277 U.S. 438 (1928).

20. *Id.* at 485 (Brandeis, J., dissenting).

21. *See* 18 U.S.C. § 242 (1988) (authorizing criminal penalties); 42 U.S.C. § 1983 (1988) (authorizing civil damages).

22. James Spiotto surveyed the suits filed against the Chicago police from 1961 to 1972 and found that only four involved allegations of illegal search and seizure activity. *See* James E. Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives*, 2 J. LEGAL STUD. 243, 269-71 (1973). Two of the suits contained allegations of flagrant violations (searches of homes without probable cause or warrants). One of these suits ended in a settlement for nominal damages (less than $3,000) while the other ended in a verdict for the defendant. *Id.* at 271-72. Spiotto concluded, "It appears not only that citizens are reluctant to sue police for tort or civil rights violations in regard to illegal search and seizure, but also that juries may be reluctant to award damages in such actions." *Id.* at 272.

justice. A system that provides some type of punishment in every case in which a judge finds wrongful government conduct would be more just.

Of course, one must decide whether the exclusionary rule is an appropriate "penalty" for the government.[23] One could view the exclusionary rule as a remedial, rather than punitive, device. Or, assuming the essentially punitive nature of the exclusionary rule, one could argue that it punishes society rather than the government; after all, society is harmed if a guilty person goes free and commits a crime she would otherwise not have committed.[24]

We view these objections as excessively technical and legalistic. Viewed pragmatically, the suppression of wrongfully acquired evidence makes the task of proceeding with the trial more difficult and thus penalizes the executive branch of government, the very branch that acquired the evidence by wrongful means. Moreover, application of the exclusionary rule is a highly visible event, closely associated with a criminal trial. Thus, its application highlights the wrongful government conduct at the very moment its consequences are most evident. Ignoring the misconduct at this stage of the process at least implicitly minimizes its seriousness. Of course, one consequence of suppression is potential future harm to society, but that hardly means that the government itself is not also being punished.

Consider the analogy of the entrapment doctrine. The entrapment doctrine "punishes" the government by denying it the ability to proceed with a criminal prosecution when the crime would not have happened but for governmental bad-faith conduct. It is true that the Court has based entrapment on a presumed Congressional intent not to punish defendants who are deemed to lack the requisite mens rea.[25] But most commentators, and more than a few judges, view that rationale as no more than a fiction.[26]

23. For an example of the Supreme Court referring to the exclusionary rule as a "penalty" against the government, see New York v. Harris, 495 U.S. 14, 17 (1990).

24. *See, e.g.,* Brewer v. Williams, 430 U.S. 387, 415-17 (1977) (Burger, C.J., dissenting).

25. *See, e.g.,* Sherman v. United States, 356 U.S. 369, 372 (1958).

26. *See, e.g., id.* at 379 (Frankfurter, J., joined by Douglas, Harlan, and Brennan, JJ., concurring); WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE 282 (2d ed. 1992) (ascribing the "fiction" charge to the opponents of the mens rea rationale); Louis M. Seidman, *The Supreme Court, Entrapment, and Our Criminal Justice Dilemma*, 1981 SUP. CT. REV. 111, 115 n.13 (noting that "commentators have overwhelmingly favored an objective approach" that rejects the fictional mens rea rationale).

We agree. In our view, the real rationale for exonerating entrapped defendants is that the wrongful government conduct, and not the defendant, is seen as the cause of the crime. On this view, the entrapment doctrine manifests an important parallel between citizens and the government: each is subject to punishment for committing (or causing) crimes.[27] The entrapment doctrine thus punishes the government by preventing it from prosecuting the crime it has caused. Likewise, a bad-faith Fourth Amendment doctrine would punish the government by preventing it from using evidence it would not have had but for its bad-faith conduct.

Working from this premise, the wrongfulness of a constitutional violation should be considered in deciding whether to suppress evidence. This is neither a surprising nor a new idea. For example, when the Supreme Court decided *Rochin v. California*,[28] the Fourth Amendment exclusionary rule did not yet apply to the states.[29] Nonetheless, the Court ordered the evidence suppressed under the authority of the Due Process Clause of the Fourteenth Amendment on the ground that the police officers' conduct, which included forced stomach-pumping, was conduct that "shocks the conscience."[30] The Court noted a concern with the "community's sense of fair play and decency," explaining that "[n]othing would be more calculated to discredit law and thereby to brutalize the temper of a society" than "to sanction the brutal conduct" that produced the evidence in question.[31]

Similarly, in *Brown v. Mississippi*,[32] the Court held that using confessions obtained by methods "revolting to the sense of justice . . . as the basis for conviction and sentence was a clear denial of due process."[33] The *Rochin* and *Brown* decisions demonstrate that suppression is required, on a case-by-case basis under the Due Process Clause, when the government's conduct is sufficiently egregious. The extent to which this doctrine reaches today is unclear, however. The application of the Fourth Amendment exclusionary rule to the states[34]

27. Since the doctrine's inception in Sorrells v. United States, 287 U.S. 435 (1932), a vigorous debate has occurred over how to decide when the government is responsible for causing a crime. But this debate does not detract from our point that the core idea of entrapment manifests a parallel between individual and government morality.

28. 342 U.S. 165 (1952).

29. *See* Mapp v. Ohio, 367 U.S. 643 (1961) (post-*Rochin* case mandating exclusionary rule for state courts).

30. *Rochin*, 342 U.S. at 172.

31. *Id.* at 173-74.

32. 297 U.S. 278 (1936).

33. *Id.* at 286.

34. *See Mapp*, 367 U.S. at 655.

and the broad protection against coerced confessions created by *Miranda v. Arizona*[35] seem to leave little room for the Due Process Clause to operate as the basis for exclusion. Indeed, defendants' *Rochin*-type claims are most often raised in vain.[36] While the Fourth Amendment should offer more protection against flagrant government misconduct involving searches or seizures than the "shock-the-conscience" test of the Due Process Clause,[37] *Rochin* and *Brown* support our basic point: The wrongfulness of a constitutional violation is relevant to whether or how the government should be permitted to use evidence found by means of the violation.

If one accepts that government conduct should be evaluated by the same standards of justice as that of individuals, what we have called the Kantian proportionality principle must apply to the Fourth Amendment. The remaining issue then is whether the exclusionary rule is the appropriate means of punishing the government more severely when its behavior is more culpable. In the absence of a more efficacious legislative remedy for flagrant police misconduct, the exclusionary rule remains, in our view, the best mechanism for assessing a proportional penalty.

B. Governmental Integrity

Pure notions of Kantian retribution may be somewhat out of place in the exclusionary rule debate because exclusion is an issue only when the police have found evidence of guilt. Even the most flagrant violation of the Fourth Amendment is not without some social justification if it produces evidence of a crime. But viewing harsher sanctions for flagrant government violations as an expression of community outrage is an independent ground for denying the government the fruits of its bad-faith conduct. As we have argued elsewhere,[38] a deeply held societal convention underlies and informs the Fourth Amendment prohibition of unreasonable searches and seizures. The community is outraged when this convention is violated,

35. 384 U.S. 436 (1966). For an argument that *Miranda*'s protection may be at least partly illusory, see George C. Thomas III, *A Philosophical Account of Coerced Self-Incrimination*, 5 YALE J.L. & HUMAN. 79 (1993).

36. *See, e.g.*, Irvine v. California, 347 U.S. 128, 133 (1954) (holding *Rochin* not applicable because the defendant was not physically coerced); *see also* JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE 237 (1991) (noting that *Rochin* "is only infrequently applied today to exclude real evidence secured from a person in a violent manner").

37. The Court has restricted the *Rochin* doctrine to "coercion, violence or brutality." *See* Irvine v. California, 347 U.S. 128, 133 (1954).

38. *See* Thomas & Pollack, *Saving Rights*, *supra* note 1, at 158-63.

particularly when the violation is willful, broad in scope, and substantially unjustifiable.

The outrage results from a perceived failure of governmental integrity. The interest in governmental integrity is manifested in Plato's argument that the meaning of justice for individuals can be gleaned from what justice means as applied to the government, for the latter is nothing more than individual justice "writ large" for all to see. Recent highly publicized incidents, such as the Rodney King beating, show how bad-faith governmental conduct undermines the public perception of the integrity of those who are charged with the responsibility of enforcing the rules.[39] Public skepticism about governmental integrity can only increase if evidence derived from bad-faith police conduct is admitted by application of some arcane exception to the exclusionary rule. Moreover, bad-faith violations seem likely to undermine the public perception of governmental integrity to a degree that is disproportionate to the frequency of their occurrence. One forced stomach-pumping can create more skepticism about police integrity than dozens of technically incorrect warrants. Thus, preserving governmental integrity requires a broader exclusionary rule when the evidence is uncovered by bad-faith violations of the Fourth Amendment.

In the 1960s, the Supreme Court justified the exclusionary rule on two grounds: deterrence and judicial integrity.[40] The notion of "judicial integrity" is, we believe, part of governmental integrity. In *United States v. Janis*,[41] however, the Court merged the judicial integrity rationale into the deterrence rationale, explaining that the imperative of judicial integrity is to ensure adequate deterrence and no more.[42] But *Janis* did not involve a bad-faith violation; the Fourth Amendment claim challenged a search based on a technically defective warrant,[43] which today would qualify as a good-faith search.

A distinction can be drawn between the morality of intermediate violations and that of bad-faith violations. A police officer who violates the Constitution, but does not act in bad faith, is arguably not engaging in unjust or immoral conduct. Zealous policing, up to some point, is a social good. In these cases of nonflagrant violations, the

39. *See* Thomas & Pollack, *Rethinking Guilt, Juries, and Jeopardy*, *supra* note 1, at 5-6 (discussing societal reaction to the Rodney King incident).

40. *See, e.g.*, Elkins v. United States, 364 U.S. 206, 217, 222-23 (1960).

41. 428 U.S. 433, 457 n.35 (1976).

42. *Id.*

43. *Id.* at 435 n.1.

Court's merger of judicial integrity and deterrence is defensible. But when a police officer engages in bad-faith conduct, she is acting immorally. In these cases, governmental injustice will be "writ large" for all to see. In this limited context, at least, Justice Brandeis was right to worry about what the government is "teach[ing] the whole people by its example."[44] In this limited context, at least, judges who ignore the government's flagrant immoral conduct and admit the fruits of the government's bad faith are themselves part of the governmental injustice.

Our entrapment analogy is apt here. In entrapment cases, as in cases involving bad-faith Fourth Amendment conduct, the government seeks to benefit from wrongdoing that has crossed the line between zealous policing and egregious misconduct. In the Court's first entrapment case, Justice Roberts stressed "the inherent right of the court not to be made the instrument of wrong."[45] A revived notion of judicial integrity in bad-faith Fourth Amendment cases would similarly require judges to avoid endorsing the harm that has resulted from the government's bad-faith conduct.

Although the *Janis* Court merged the concept of judicial integrity into deterrence for intermediate Fourth Amendment violations, the Court accepted our argument that an independent role for judicial integrity would require a much broader exclusionary rule. In a case decided the same day as *Janis*, the Court noted that notions of judicial integrity, if "[l]ogically extended," would require a broader exclusionary rule that would include the full availability of habeas proceedings, as well as abandonment of the standing requirement, impeachment exception, and grand jury exception.[46] The Court rejected this conceptualization of a broad exclusionary rule, but the underlying violations at issue were not flagrant,[47] thus technically leaving unresolved the effect of judicial integrity concerns in bad-faith cases.

When evidence has been obtained by bad-faith police conduct, an additional integrity-related justification for a broader exclusionary

44. Olmstead v. United States, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting).

45. Sorrells v. United States, 287 U.S. 435, 456 (1932) (separate opinion of Roberts, J., joined by Brandeis and Stone, JJ.).

46. Stone v. Powell, 428 U.S. 465, 485 (1976). We discuss each of these limitations on the exclusionary rule in Part III, *infra*.

47. In *Stone*, 428 U.S. at 495, the state courts had found *no* Fourth Amendment violation. While the state courts might have been wrong, it is unlikely they found no violation in the face of evidence of a bad-faith violation. Similarly, in *Janis*, 428 U.S. at 435 n.1, the facts disclose a violation that would today call for application of the *Leon* good-faith exception to the exclusionary rule. *See* Unites States v. Leon, 468 U.S. 897 (1984).

rule arises: In these cases, the probative value of the seized physical evidence is subject to question.[48] If police officers are willing to engage in flagrant misconduct to obtain evidence against a particular suspect, they may also misrepresent their findings in some way, such as where they found evidence or the suspect's physical proximity to it. In extreme cases, police might even "plant" evidence. While these types of misrepresentation may be rare, the trustworthiness of the officers and, concomitantly, the trustworthiness of the evidence is reduced when bad-faith misconduct has occurred.

An analogy to the self-incrimination doctrine is helpful. Although fruits of a *Miranda* violation can be admitted to impeach a defendant, involuntary confessions are inadmissible for impeachment.[49] One rationale for this distinction is that the class of involuntary statements are less reliable than the class of statements taken in technical violation of *Miranda*.[50] This is not to say that every involuntary confession is false. Indeed, involuntary confessions are inadmissible "even though there is ample evidence aside from the confession to support the conviction."[51] Nevertheless, inadmissibility is justified, at least in part,[52] by the increased risk of an untrue confession being admitted.[53] A similar increased risk of unreliable evidence is present when police have found the evidence by means of bad-faith conduct. Using this evidence in any manner in a court proceeding threatens the reliability of the outcome.

Thus, there are three integrity-related justifications for excluding evidence when it has been obtained unlawfully: to redress community outrage, to preserve judicial integrity, and to prevent admission of a class of evidence about which reliability concerns exist. All three support broadening the exclusionary rule when the government has discovered evidence through bad-faith conduct.

48. *See, e.g.*, INS v. Lopez-Mendoza, 468 U.S. 1032, 1050-51 (1984) ("Egregious violations of Fourth Amendment . . . liberties . . . might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.").

49. Mincey v. Arizona, 437 U.S. 385, 396-402 (1978).

50. *See id.* at 397-402.

51. Jackson v. Denno, 378 U.S. 368, 376 (1964).

52. For an explanation of the self-incrimination principle that relies less on the reliability of statements and more on choice and autonomy, see George C. Thomas III & Marshall D. Bilder, *Aristotle's Paradox and the Self-Incrimination Puzzle*, 82 J. CRIM. L. & CRIMINOLOGY 243 (1991).

53. *See* 2 JOHN HENRY WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 821 (1923) (noting that it is proper to exclude confessions in criminal cases based on a much lower risk of falsity than is required in civil cases because of "the higher degree of caution always exercised by the law in favor of the accused").

C. Deterrence

The Supreme Court has repeatedly stated that the purpose of the exclusionary rule is to deter Fourth Amendment violations.[54] We assert two premises about deterring violations. First, intentional violations are inherently more susceptible to deterrence than inadvertent violations. Second, the greater the scope and harmfulness of a violation, the more likely it is that the actor intended the violation. Treating bad-faith violations more harshly can thus be justified on deterrence grounds alone. Indeed, Justice White, who wrote the Court's opinion in *United States v. Leon*[55] announcing the *good-faith* exception to the exclusionary rule, noted in another case that the use of the exclusionary rule "is most certainly justified [in] the deterrence of bad-faith violations of the Fourth Amendment."[56]

The Court's justification in *Leon* for the good-faith exception to the exclusionary rule is instructive on the deterrence issue:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of the accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force.[57]

This quotation implicitly acknowledges the difference between willful and negligent violations of the Fourth Amendment. While both violations lack good faith, willful and negligent violations should be treated differently with respect to deterrence. Sanctions should be more efficacious when the offender willfully engages in conduct that she knows is unconstitutional than when she is merely negligent about her behavior or its consequences. The *Leon* Court makes clear that good-faith violations will be treated more favorably.[58] Our proposition is that bad-faith violations be treated less favorably.

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54. *See, e.g.*, United States v. Leon, 468 U.S. 897, 900 (1984); Stone v. Powell, 428 U.S. 465, 486 (1976); United States v. Janis, 428 U.S. 433, 446 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974).

55. 468 U.S. 897 (1984).

56. Rakas v. Illinois, 439 U.S. 128, 168 (1978) (White, J., dissenting). For further explication of White's views on restricting the scope of the exclusionary rule, see *Leon*, 468 U.S. at 918-25 (announcing good-faith exception to exclusionary rule); *Stone*, 428 U.S. at 536-42 (1976) (White, J., dissenting) (arguing for creation of a good-faith exception).

57. *Leon*, 468 U.S. at 919 (quoting United States v. Peltier, 422 U.S. 531, 539 (1975)).

58. *See id.* at 913-25. To be sure, *Leon* set an objective rather than a subjective standard. *See* DRESSLER, *supra* note 36, at 250 (noting that "good faith" is, in a sense, a "mis-

Indeed, though this point rests on notions both of proportionality and deterrence, criminal law has traditionally drawn a distinction between harms caused willfully and those caused negligently. In many cases, for example, harms caused negligently are not considered crimes at all.[59] In virtually all cases, harms caused intentionally, or even recklessly, are punished more severely.

Some might respond that bad-faith violations occur only infrequently, and thus there is little need for a greater deterrent. Of course, those who subscribe to this rationale can take comfort in their own argument—if our remedy applies only infrequently, its potential for harm is limited. A broadened exclusionary rule that raises the cost of bad-faith violations thus appears to be a reasonable deterrence-based response.

D. Conclusion

This Part presented three justifications for a broad remedy in the case of bad-faith Fourth Amendment violations. The latter two justifications—governmental integrity and deterrence—partake of the Kantian proportionality principle first identified. A higher price for conduct that is qualitatively more wrongful is both expected by society and a greater deterrent. The next problem is to identify the conduct that should be considered qualitatively more wrongful. Following that discussion, the various limitations on the exclusionary rule will be analyzed in light of our argument that they should be eliminated when a bad-faith violation has occurred.

II. Bad-Faith Fourth Amendment Conduct

Courts occasionally have relied on the wrongfulness of a constitutional violation when deciding whether to suppress evidence uncovered by the violation. As noted in Part I, for instance, the Court in *Rochin* found that a particular search "shock[ed] the conscience." Although the extreme facts of *Rochin* do not provide much guidance in distinguishing between bad-faith searches and intermediate Fourth Amendment violations, one can begin with the *Rochin* principle that if police are "guilty of unlawfully assaulting, battering, torturing and

nomer" because an officer who knew a warrant was invalid could claim "good faith" if the objective standard were met). But the deterrence analysis in *Leon* suggests that the good-faith exception is based in large part on the difficulty of deterring actors who have good-faith intentions. *See Leon*, 468 U.S. at 918-21.

59. *See, e.g.*, MODEL PENAL CODE § 2.02 commentary at 244 (1962) (noting that "negligence is an exceptional basis of [criminal] liability").

falsely imprisoning" a suspect,[60] the search has been conducted in bad faith.

However, we believe bad-faith searches can occur in the absence of such extreme violations. One example is *United States v. Payner*,[61] in which the government seized documents from a bank official's locked briefcase and sought to use them against Payner, one of the bank's depositors. The district court held this conduct to be an "outrageously illegal seizure" that violated the Due Process Clause.[62] The court found a "purposeful, bad faith hostility toward the Fourth Amendment rights of" the bank official, designed "to obtain evidence against persons like Payner."[63] This general finding was based in part on a specific finding that the government

> affirmatively counsels its agents that the Fourth Amendment standing limitation permits them to conduct purposefully an unconstitutional search and seizure of one individual in order to obtain evidence against third parties, who are the real targets of the governmental intrusion, and that the IRS agents in this case acted, and will act in the future, according to that counsel.[64]

One indication that a search has been performed in bad faith, then, is a purposeful intent to act in violation of the Fourth Amendment and to exploit one of the limitations on the exclusionary rule. But a bad-faith violation can be proven in other ways. An example is *Mapp v. Ohio*,[65] the 1961 case that, by holding the exclusionary rule applicable to the states, overturned the 1949 case of *Wolf v. Colorado*.[66] We think it is no coincidence that the Court picked *Mapp* as the vehicle to overturn such a recent precedent and accomplish a result that was bound to be unpopular with state courts, police, and

60. *Rochin*, 342 U.S. at 167 (quoting People v. Rochin, 225 P.2d 1, 3 (Cal. Ct. App. 1950)).

61. 434 F. Supp. 113 (N.D. Ohio 1977), *aff'd*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980). For a discussion of the grounds on which the Supreme Court reversed the lower courts, and an evaluation of the reversal, see *infra* notes 128-144 and accompanying text.

62. *Id.* at 133.

63. *Id.*

64. *Id.* at 132-33.

65. 367 U.S. 643 (1961).

66. The Court in *Mapp* never explicitly stated that it was overruling the contrary precedent of Wolf v. Colorado, 338 U.S. 25 (1949). The closest the Court came is a statement that "after [*Wolf*'s] dozen years on our books, [we] are led by it to close the only courtroom door remaining open to evidence secured by official lawlessness" in violation of the Fourth Amendment. *Mapp*, 367 U.S. at 654-55. But the first sentence of Justice Harlan's dissent begins, quite candidly and correctly, by noting that the Court was "overruling the *Wolf* case." *Id.* at 672 (Harlan, J., dissenting).

many politicians.[67] The facts of *Mapp* provide a good baseline for delineating bad-faith searches, and therefore the Court's recitation of the facts will be set out in some detail. Three Cleveland police officers went to Mapp's house with the hope of finding gambling material and a person who was wanted in connection with a bombing.[68] Upon their arrival,

> the officers knocked on the door and demanded entrance but appellant, after telephoning her attorney, refused to admit them without a search warrant. They advised their headquarters of the situation and undertook a surveillance of the house.
>
> The officers again sought entrance some three hours later when four or more additional officers arrived on the scene. When Miss Mapp did not come to the door immediately, at least one of the several doors to the house was forcibly opened and the policemen gained admittance. Meanwhile Miss Mapp's attorney arrived, but the officers, having secured their own entry, and continuing in their defiance of the law, would permit him neither to see Miss Mapp nor to enter the house. It appears that Miss Mapp was halfway down the stairs from the upper floor to the front door when the officers, in this highhanded manner, broke into the hall. She demanded to see the search warrant. A paper, claimed to be a warrant, was held up by one of the officers. She grabbed the "warrant" and placed it in her bosom. A struggle ensued in which the officers recovered the piece of paper and as a result of which they handcuffed appellant because she had been "belligerent" in resisting their official rescue of the "warrant" from her person. Running roughshod over appellant, a policeman "grabbed" her, "twisted [her] hand," and she "yelled [and] pleaded with him" because "it was hurting." Appellant, in handcuffs, was then forcibly taken upstairs to her bedroom . . . .[69]

The ensuing search was "widespread," including a dresser, a chest of drawers, a photo album, personal papers, a child's bedroom, and the basement. No search warrant was produced at trial, and the police found neither a bombing suspect nor gambling paraphernalia. Instead, they found a few items of obscenity.[70]

There are several remarkable features about the Court's description of the Fourth Amendment violation. One is the Court's value-laden description of the "facts": The officers "continu[ed] in their defiance of the law"; they acted in a "highhanded manner"; and they ran

67. Indeed, the Fourth Amendment issue in *Mapp* "was briefed not at all and argued only extremely tangentially" in the Supreme Court, *id.* at 676 (Harlan, J., dissenting), suggesting that the Court belatedly recognized that *Mapp* presented an appropriate case for overruling *Wolf*. *See supra* note 66.

68. *Mapp*, 367 U.S. at 644.

69. *Id.* at 644-45 (footnote omitted) (brackets in original).

70. *Id.* at 668 (Douglas, J., concurring) (describing the evidence offered against Mapp as "four little pamphlets, a couple of photographs and a little pencil doodle").

"roughshod over appellant."[71] These terms suggest a visceral reaction to the police conduct consistent with the notion of community outrage at bad-faith searches that undermine governmental integrity.[72] The Court's visceral reaction also appears in its use of gender stereotypes to make the police misconduct appear more offensive. At key points in the recitation of facts, for example, the Court abandoned the convention of using the term "appellant" in favor of "Miss Mapp."[73] The Court noted that Mapp placed the purported warrant in her "bosom," and the police rescued it from there after a "struggle."[74] Finally, the Court described somewhat graphically the physical violence that took place.[75]

Consider the elements of the police activity in *Mapp* that would justify outrage on the part of the Court. First, the evidence suggests that the police knew they were violating the Fourth Amendment. The police initially desisted when Mapp refused them entry; they had time to obtain a search warrant and apparently did not do so; after they ultimately broke into her house, they pretended to have a warrant when she asked to see a warrant; and they refused to allow her lawyer to see her or to enter the house. The police obviously knew that Mapp stood before them insisting they respect her privacy rights. The careful planning of the search and the call for reinforcements also suggests, using criminal law language of homicide, a premeditated violation.

A second factor in *Mapp* that could explain the Court's visceral reaction is the scope of the violation. It is no exaggeration to say, as Justice Douglas did in his concurring opinion, that the officers "laid siege to the house."[76] The ensuing search of the premises was both extremely thorough and invasive. This is qualitatively different conduct than, for example, an officer placing his hand in the pocket of a suspect and seizing a bag of heroin.[77]

Third, there was the harmfulness of the search. While every violation of the Fourth Amendment is harmful, we use "harmful" to

71. *Id.* at 644-45.

72. A cynic might assert that the Court was simply softening up the opposition by stressing the flagrant abuse of Mapp's Fourth Amendment rights as a way of justifying the Court's holding. We would agree that the Court likely used value-laden terms to make its holding more palatable. But the Court would use this technique only if the conduct described is likely to evoke a reaction of outrage.

73. *See id.* at 644.

74. *Id.*

75. *Id.* at 644-45.

76. *Id.* at 667 (Douglas, J., concurring).

77. *See* Sibron v. New York, 392 U.S. 40 (1968).

mean injurious beyond the interference with privacy or property interests that constitutes a Fourth Amendment violation. One example is the use of excessive force to accomplish the search and seizure. In *Mapp*, this type of harm consisted of using physical force to break into Mapp's house over her objections and to subdue her when she sought to retain the purported warrant, as well as conducting at least part of the search in her presence while she was handcuffed. Because the Fourth Amendment violation was the lack of a warrant, the officers' treatment of Mapp and her physical and psychological distress can be viewed as an additional harm.

An additional harm can also exist when more than one violation of the Fourth Amendment occurs in the same search. Assume that, along with the obscene items, the police seized a collection of Shakespeare's plays belonging to Mapp. On these assumed facts, one violation was the lack of a warrant, and a second would be the seizure of Mapp's Shakespeare collection, a seizure which presumably would not have been authorized by any warrant the police might have had.[78] Either type of additional Fourth Amendment violation—excessive force or multiple violations—is an added harm, indicative of a bad-faith search.

Finally, the degree to which actual suspicion falls short of legally sufficient cause is relevant to the bad-faith determination. The greater the difference between the actual level of suspicion and the level that is legally sufficient, the more egregious the police conduct becomes.[79] Although the *Mapp* Court did not address the insufficiency of the suspicion, it can be inferred for our purposes from the fact that the police did not find the bombing suspect or gambling paraphernalia they sought.[80] Obviously, lack of success does not necessarily indicate that the police lacked probable cause. The term "probable cause" inher-

78. The police in *Mapp* sought gambling material and a person who was wanted in connection with a bombing. *Mapp*, 367 U.S. at 644. The seizure of a Shakespeare collection would thus violate the Fourth Amendment even if the police had a warrant to search for the evidence they sought.

79. The bad-faith factors relating to legally-sufficient cause, and the scope and harmfulness of the search may be dependent on one another. In Fourth Amendment analysis generally, the lower the actual suspicion, the narrower the permissible scope and intensity of the police conduct. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 26-27 (1968) (holding that reasonable suspicion, which is less than probable cause, permits only a minimal stop and frisk for weapons, rather than an arrest and full-blown search incident to arrest).

80. Both Chief Justice Pratt and Lord Mansfield found the common law to include the failure of the search as one factor making it illegal. *See* Leach v. Three of the King's Messengers, 19 How. St. Tr. 1001, 1026 (K.B. 1765); Wilkes v. Wood, 98 Eng. Rep. 489, 502 (K.B. 1763).

ently means that police will often be mistaken—perhaps even more often than not. So, by itself, the failure of the search is not dispositive. Yet, it does seem to have an additive quality on the facts of *Mapp*. Given the broad scope of the search, its harmfulness, and the knowledge of the police that their conduct violated the Fourth Amendment, the complete failure[81] of the search seems somehow indicative of patently insufficient cause.

The facts of *Mapp* thus permit us to identify four factors relevant to bad faith: the officers' mental state, the scope of the Fourth Amendment violation, the harmfulness of the violation, and the insufficiency of cause. The next question is what combination of factors is required for a finding of bad faith. This question can be answered by removing one factor at a time. First, remove the fourth factor, the insufficiency of cause: What if the police have legally-sufficient cause and the search turns up gambling paraphernalia, but the search is performed with knowledge of violation of the warrant requirement, is excessive in scope, and is harmful? The other three factors should still qualify the search as a bad-faith violation. The same holds if factor three, the harmfulness of the search, is also eliminated. Assume the officers treated Mapp with courtesy, politely refusing to give her a copy of the warrant and restraining her only as necessary to conduct the search. The remaining factors—knowledge of the violation and excessive scope—suggest that the search still should be considered a bad-faith violation. Finally, remove the second factor as well by making the scope of the search as narrow as possible. Assume the police discovered gambling paraphernalia as soon as they entered the back door, arrested Mapp, and searched no more. While we are somewhat less sure of our conclusion here, we think this is still a bad-faith violation. The long-standing rule is that, absent "an exceptional situation," a warrant is necessary to search a dwelling.[82] This rule is clear enough that its violation on the facts of *Mapp* suggests a knowing or intentional violation of the Fourth Amendment, which in turn suggests bad faith.

Removing factors one at a time demonstrates that a culpable mental state of the police officers is the most important component of

81. By "complete failure," we mean the absence of the sought-after gambling materials and bombing suspect. Obviously, the exclusionary rule cannot be a potential remedy unless the search uncovered some evidence of criminal activity and thus is not a complete failure from the perspective of the police. In *Mapp*, the officers found obscene materials.

82. *See* Vale v. Louisiana, 399 U.S. 30, 34 (1970) (noting that "past decisions make clear" the existence of this rule).

a bad-faith violation. This result is hardly surprising, since "bad faith" implies a wrongful mental state. Indeed, the *Leon* Court gave examples of cases in which good faith would be categorically foreclosed, despite the existence of a warrant. All of these cases involve the officer's presumptive knowledge that she is violating the Fourth Amendment.[83] Of course, the *Leon* limitations on the good-faith exception suffice to justify only the truncated exclusionary rule that accompanies intermediate violations of the Fourth Amendment. But in limiting *Leon*, the Court was clearly concerned with intentional misuse of the warrant process,[84] and intentional misuse would often signal bad faith as well as the absence of good faith. Thus, the level of culpability of the officers' mental state seems to be the most important factor in the bad-faith calculus.

Indeed, the analogy made in the last Part to the distinctions in criminal law mental states can be expanded. By combining common law with the Model Penal Code's hierarchy of mental states, the bad-faith mental states could be described, in a descending hierarchy, as premeditated, knowing, and reckless.[85] Premeditation involves planning and calculated conduct. It is similar to the "willful" mental state

83. The Court noted that the officer cannot claim good-faith reliance on a warrant when (1) the officer-affiant misleads a judge by false information that the affiant "knew was false or would have known was false except for his reckless disregard of the truth"; (2) the warrant was obviously deficient, either facially or because it was based on an affidavit that contained woefully inadequate probable cause; and (3) the judge "wholly abandon[s] his judicial role" and participates in the search. United States v. Leon, 468 U.S. 897, 923 (1984). Although the last category seems out of place as a measure of the officer's lack of good faith because the judge seems to be the cause of the violation, the Court blithely remarked that "in such circumstances, no reasonably well-trained officer should rely on the warrant." *Id.*

84. William Stuntz has made a penetrating analysis of the Court's warrant doctrine. Stuntz unmasks an underlying, unspoken assumption that police dishonesty in obtaining warrants is not a major problem. William J. Stuntz, *Warrants and Fourth Amendment Remedies*, 77 VA. L. REV. 881, 942 (1991). Like Stuntz, we do not know whether this optimistic assumption is justifiable. *See id.* at 942-43. However, even if it is, our proposal would provide additional penalties in the few instances when the police intentionally act to deceive the magistrate.

85. We have omitted two Model Penal Code mental states, while adding the common-law concept of premeditation. We added premeditation because it represents a more culpable mental state and thus evidences bad faith. The omitted mental states are purpose and negligence. We do not believe that a negligent mental state could ever signal bad faith. *See infra* notes 91 -92 and accompanying text. We omitted purpose because, at least in the context of bad-faith violations, purpose is not substantially different from knowledge. It is difficult to imagine cases in which the dominant police motive was to violate a suspect's Fourth Amendment rights rather than to obtain evidence. As long as the dominant motive is to obtain evidence, the key question is whether the police officer knew that her conduct was going to violate the Fourth Amendment. There is, then, no reason to make fine distinctions between knowledge and purpose when making a determination of bad faith.

required to prove the federal crime of depriving individuals of their Fourth Amendment rights.[86] The Supreme Court has indicated that this mental state is satisfied when the "aim" of the officers was "to deny the protection that the Constitution affords."[87] Although premeditation implies planning, and willful does not, the crux of both mental states is the aim or purpose to deny an individual a known protection offered by the Fourth Amendment. Relevant in showing premeditation would be evidence of prior, similar violations. Ongoing and systematic violations of the Fourth Amendment can be the most damaging type of violation and, in our judgment, would always or virtually always indicate bad faith.

The next most culpable mental state is knowing. As it falls short of premeditation, a finding of a knowing mental state does not necessarily entail a consideration of motives. Nevertheless, the actor's contemporaneous knowledge that her conduct violates the Fourth Amendment suggests bad faith. Knowledge of the constitutional consequences means, after all, that the actor could have chosen not to violate the Fourth Amendment. By proceeding, she has exhibited a disregard for the Fourth Amendment that should be strong evidence of bad faith. Evidence of a good motive can, of course, rebut a finding of bad faith even when the officer knew she was violating the Fourth Amendment. Good motives would include protecting public safety and the difficulty or potential danger of compliance. For example, assume the police had some level of suspicion that the bombing suspect was in Mapp's house and that he posed a present danger to public safety. On these assumed facts, the search in *Mapp* would still be unconstitutional if the police suspicion did not rise to the level required by the emergency search doctrine.[88] However, the honest belief in the threat to public safety lessens the bad-faith nature of the search because recourse to the warrant procedure would be potentially dangerous.

The third level of culpable mental states is recklessness. Tracking the language of the Model Penal Code, this mental state is the police officer's "conscious[ ] disregard[of] a substantial and unjustifiable risk" that his conduct would violate the Fourth Amendment.[89] The

86. *See* 18 U.S.C. § 242 (1988) (imposing criminal liability for willfully depriving a person of any rights secured by the Constitution or laws of the United States).

87. Williams v. United States, 341 U.S. 97, 102 (1951).

88. *See* Warden v. Hayden, 387 U.S. 294 (1967) (approving warrantless, emergency search of dwelling, without specifying the level of suspicion needed to obviate the need for a warrant).

89. MODEL PENAL CODE § 2.02(2)(c) (1962).

disregarded risk "must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law-abiding [police officer] would observe in the actor's situation."[90] Given the substantially lower culpability entailed by reckless conduct, a reckless violation of the Fourth Amendment would rarely weigh heavily in the bad-faith calculus. Nonetheless, if the deviation from the typical standard of conduct were sufficiently gross, the conscious disregard of the risk to Fourth Amendment values could be a significant factor pointing to bad faith.

By requiring a minimum mental state of recklessness, our bad-faith standard would be substantially higher than that required for the federal tort of deprivation of constitutional rights, which requires only a showing of negligence.[91] As negligent Fourth Amendment violations constitute what we have been calling intermediate violations,[92] our bad-faith concept should require a higher standard. Moreover, the strong medicine we will shortly prescribe for bad-faith violations necessitates a relatively high standard of culpability.

The other bad-faith factors—the scope and harmfulness of the violation, and the insufficiency of cause—become more important as the culpability of the mental state lessens. Although a bad-faith characterization is unlikely when the officer acts recklessly, it becomes more likely if the other factors strongly indicate bad faith. Consider *Silverthorne Lumber Co. v. United States*,[93] a case in which the officers, seeking to inspect and copy otherwise unobtainable business records, entered a business without a warrant or a "shadow of authority."[94] Leaving aside, for the moment, the officers' mental state, the

90. *Id.*

91. *See, e.g.*, Chavis v. Rowe, 643 F.2d 1281 (7th Cir.), *cert. denied*, 454 U.S. 907 (1981) (defining 42 U.S.C. § 1983 standard as whether defendants knew or should have known that their conduct violated constitutional rights).

92. The *Leon* good-faith violations are, by definition, those in which the officer did not act negligently. Negligent Fourth Amendment violations would thus constitute the rest of Fourth Amendment violations in the Court's typology, and we seek to amend that typology only by carving out a category of bad-faith violations at the more culpable end of the spectrum. *Cf.* Illinois v. Gates, 462 U.S. 213, 259 n.14 (1983) (White, J., concurring) (noting that "the question of exclusion must be viewed through a different lens when a Fourth Amendment violation occurs because the police have reasonably erred" than when "searches and seizures [are] perpetrated in intentional and flagrant disregard of Fourth Amendment principles").

93. 251 U.S. 385 (1920).

94. *Id.* at 390-91. The Court's characterization that the officers entered without a "shadow of authority" was a rejection of the government's claim that the issuance of invalid subpoenas for certain documents provided a colorable basis for the search. *Id.* That

Silverthorne search weighs heavily in favor of bad faith due to the scope of the search. The Court noted that the officers made a "clean sweep of all the books, papers and documents found there" and took all the items to the United States Attorney's office.[95] On these facts, the harmfulness factor overlaps the scope of the search, although the seizure suggests an added harm. The police conduct was additionally harmful to the defendants if some of the seized books and papers were obviously not evidence of a crime and thus not seizable even under a warrant. The sufficiency of the cause was not discussed, but apparently the government did find documents that it wanted to use against the defendants.[96]

Making distinctions among mental states of police officers will be no easier than distinguishing mental states of criminal defendants. Just as in criminal law, however, the definitional overlap among the mental states provides a certain rough justice in application. Consider *Silverthorne* again. That the officers lacked a "shadow of authority" is consistent with either a knowing violation or one committed in conscious disregard of a particularly high risk of violating the Fourth Amendment. The weight of the officers' mental state on the bad-faith calculus in *Silverthorne* would seem roughly the same whether one viewed the mental state as knowing or as unusually reckless (based on a particularly gross deviation from the norm). Of course, if one viewed the mental state as knowing, one could also make an argument that it was premeditated as well, because at some point the officers had to decide whether to obtain a warrant. Viewed as a premeditated violation, its bad-faith weight would be somewhat greater. Regardless of how the mental state is characterized, however, the combination of bad-faith factors led the *Silverthorne* Court to call the seizure an "outrage"[97] and leads us to call it a bad-faith violation of the Fourth Amendment.

The facts in *Irvine v. California*[98] provide another example of a bad-faith search. Decided after *Rochin* but before *Mapp*, the question in *Irvine* was whether the violation rose to the "shock-the-conscience" level that required a reversal on due process grounds.[99] Police had a locksmith make a duplicate key to Irvine's home. They then entered

reasoning seems proper, since a subpoena requires the recipient to turn over documents; it is not an authorization for official entry, search, and seizure.

95. *Id.* at 390.
96. *Id.*
97. *Id.* at 391.
98. 347 U.S. 128 (1954).
99. *Id.* at 133-34.

without a search warrant and installed a microphone in the hall. Over the next thirty days, police returned twice to move the microphone, once into the bedroom and later into a closet. The state introduced conversations heard over this microphone.[100]

The Court noted that the officers' actions were "a trespass, and probably a burglary, for which any unofficial person should be, and probably would be, severely punished."[101] The Court held, however, that the violation did not "shock the conscience" because it involved a "trespass to property, plus eavesdropping," rather than "coercion, violence or brutality."[102] But consider *Irvine* under our bad-faith test. First, the violation was premeditated. Second, the scope was broad, involving three separate entries into Irvine's home over a thirty-day period along with extensive eavesdropping. Third, the violation may have involved additional harm. Indeed, the facts of *Irvine* suggest a type of additional harm apart from the ones we discussed earlier. Some aspects of privacy may deserve particularly scrupulous protection so that a violation is, without more, evidence of excessive harm. The privacy of the home may qualify for this heightened protection or, if not the entire home, surely the privacy of the bedroom.[103] With or without added harm, however, the officers' mental state and the scope of the search should qualify the police conduct in *Irvine* as a bad-faith violation.

The Court seemed to agree, noting that "[f]ew police measures have come to our attention that more flagrantly, deliberately, and persistently violated the fundamental principle declared by the Fourth Amendment."[104] The Court's three descriptive terms roughly parallel the bad-faith factors we have delineated. To describe police conduct as "flagrantly" and "deliberately" violating the Fourth Amendment is to make a judgment about the mental state of the officers. The harmfulness and scope factors are also present: There is a sense in which "flagrant" implies harmful, and a persistent violation necessarily has a broad scope. Despite these indicia of bad faith, the Court refused to suppress the conversations, declaring itself insufficiently

100. *Id.* at 130-31.

101. *Id.* at 132.

102. *Id.* at 133.

103. The Court noted that the police activity at issue "would be almost incredible if it were not admitted." *Id.* at 132. *See also* Payton v. New York, 445 U.S. 573, 585-86 (1980) (discussing sanctity of the home in Fourth Amendment context); Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (finding heightened privacy in a marital bedroom).

104. *Irvine*, 347 U.S. at 133.

shocked to apply *Rochin* and otherwise bound by precedent to hold the exclusionary rule nonbinding on the states.[105]

The *Irvine* decision not only helps illustrate our bad-faith factors, but also demonstrates that *Rochin* provides an inadequate model for identifying bad-faith searches. If the search in *Irvine* does not constitute a bad-faith search, the bad-faith category would be so narrow as to lose all of its significance. What Charles Black wrote about another type of outrageous invasion of privacy describes our view of *Irvine*:

> [It] is not so much a case that the law tests as a case that tests the law . . . . If our constitutional law could permit such a thing to happen, then we might almost as well not have any law of constitutional limitations, partly because the thing is so outrageous itself, and partly because a constitutional law inadequate to deal with such an outrage would be too feeble, in method and doctrine, to deal with a very great amount of equally outrageous material.[106]

In Part I, we argued that a bad-faith violation requires a broader application of the exclusionary rule. In this Part, we sought to give meaning to what constitutes a bad-faith violation. Once a showing of a bad-faith violation has been made, the next question is precisely how the exclusionary rule should be broadened. We now turn to this question.

III. Remedying Bad-Faith Violations

If bad-faith Fourth Amendment violations should be treated differently from intermediate violations, the next question is how that difference should be recognized in Fourth Amendment doctrine. Our working premise is that the occurrence of a bad-faith violation creates a presumption that the evidence should not be used for any purpose, a result that we will call an "unabated exclusionary rule." This presumption in bad-faith cases is justified by our Kantian proportionality principle, which requires a remedy that corresponds, at least roughly, with the level of harm and degree of wrongfulness of the government conduct.[107] Only an unabated exclusionary rule comes close to being a proportional remedy for a bad-faith Fourth Amendment violation. In the context of punishing the wrongdoer, a broader deprivation of the fruits of the violation is a more proportional penalty for a bad-faith violation. In the context of redressing the harm, a more wrong-

105. *Id.* at 133-34.

106. Charles L. Black, Jr., *The Unfinished Business of the Warren Court*, 46 WASH. L. REV. 3, 32 (1970) (describing *Griswold*, in which the Court considered whether a state could criminalize the right of married people to use birth control).

107. *See supra* Part I.A.

ful violation requires a broader remedy to minimize the harm that has befallen the victim of the violation. Though the Court repeatedly explains that Fourth Amendment violations cannot be undone,[108] unabated exclusion comes closest to returning the defendant to the status quo ante.[109] In addition to achieving a closer fit between violation and remedy, an unabated exclusionary rule is an appropriate way to achieve enhanced deterrence and to minimize loss of confidence in the integrity of the criminal justice system.

Our presumption in favor of an unabated exclusionary rule in bad-faith cases has no direct support in the case law. It is indirectly supported, however, by Justice Holmes's opinion for the Court in *Silverthorne*. The issue in that case was whether to exclude, in a grand jury proceeding, evidence derived from illegally seized evidence.[110] In holding the proffered evidence inadmissible before the grand jury, Justice Holmes wrote for the Court, "The essence of a provision forbidding the acquisition of evidence in a certain way is not merely that evidence so acquired shall not be used before the Court but that it shall not be used at all."[111] Thus, the Court extended the exclusionary rule to "any advantages the Government can gain over the object of its pursuit by doing the forbidden act."[112]

Notwithstanding *Silverthorne*'s sweeping language barring "any advantages," the Supreme Court subsequently created the limitations on the exclusionary rule noted in the Introduction. Indeed, in *United States v. Calandra*,[113] the Court substantially undermined, and could have overruled, *Silverthorne*. The *Calandra* court held that a prosecutor could question a suspect about illegally seized evidence during a pre-indictment grand jury proceeding.[114] Rather than overruling *Silverthorne*, the Court distinguished it in a footnote, principally on the ground that the grand jury in *Silverthorne* was at a post-indictment stage and was therefore acting as a general evidence-gathering arm of

108. *See, e.g.*, Linkletter v. Walker, 381 U.S. 618, 637 (1965) ("[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."); *see also* United States v. Janis, 428 U.S. 433, 443 n.12 (1976) (quoting *Linkletter*); United States v. Calandra, 414 U.S. 338, 354 (1974) (noting that exclusion of evidence is only a remedy); Elkins v. United States, 364 U.S. 206, 217 (1960) (noting that the exclusionary rule is calculated to prevent, not to repair).

109. Because unabated exclusion means that the government cannot use the evidence at all, it comes closest to undoing the violation by which the evidence was found.

110. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 390 (1920).

111. *Id.* at 392.

112. *Id.* at 391.

113. 414 U.S. 338 (1974).

114. *Id.* at 342.

the prosecutor rather than in an investigatory capacity.[115] The *Silverthorne* Court did not place any weight on this point, however, and the distinction seems too weak to justify a different result.

A more persuasive way to distinguish *Silverthorne* is by the wrongfulness of the underlying Fourth Amendment violation.[116] The Supreme Court had, prior to *Calandra*, already distinguished *Silverthorne* from another case on this ground.[117] In *Calandra*, the federal agents relied on a search warrant. The claimed violation was that insufficient probable cause supported the warrant, and that the search exceeded the scope of the warrant.[118] With regard to the first defect, *Leon* now dictates that reliance on a defective warrant is not only lacking in bad faith but also creates a presumption that the officers have acted good faith.[119] With regard to the excessive scope of the search, the question is whether a loansharking record was within the scope of a warrant authorizing seizure of bookmaking records and wagering paraphernalia.[120] Even if the loansharking record is determined to be outside the scope of the warrant, the resulting Fourth Amendment violation likely falls significantly short of meeting our bad-faith test. Thus, the facts in *Calandra* would not create a presumption in favor of an unabated exclusionary rule under our proposal.

115. *Id.* at 352 n.8.

116. It might be significant that the motion to suppress in *Calandra* involved testimony regarding tainted evidence, not the tainted evidence itself. *Id.* at 342. The *Calandra* Court narrowly framed the issue as "whether a witness summoned to appear and testify before a grand jury may refuse to answer questions on the ground that they are based on evidence obtained from an unlawful search and seizure." *Id.* at 339. Thus, the fruit at issue in *Calandra* was more attenuated from the violation than admission of the tainted documentary evidence itself. Perhaps *Calandra* means only that there is a point at which the attenuation is so great that suppression is unnecessary, particularly when the violation is not very severe. *See, e.g.*, Nardone v. United States, 308 U.S. 338, 341 (1939) (explaining that benefits from tainted evidence can "become so attenuated as to dissipate the taint").

117. The Court in United States v. Wallace & Tiernan Co., 336 U.S. 793, 796 (1949), explained:

> This Court [in *Silverthorne*] viewed the whole performance of the unlawful search and seizure of the Silverthorne books and papers as an "outrage," planned or at least ratified by the Government. Under these circumstances it was held that the Government was neither entitled to use the original documents nor any knowledge obtained from the originals, the photostats, or the copies.

118. *Calandra*, 414 U.S. at 341.

119. The good-faith exception in *Leon* requires that a warrant not be so defective as to give the officer grounds to question its validity. *Leon*, 468 U.S. at 923. Thus, reliance on a warrant is only presumptively good-faith behavior.

120. *Calandra*, 414 U.S. at 340-41.

The *Silverthorne* Court, by contrast, characterized the seizure in that case as "an outrage which the Government now regrets."[121] We noted in Part II that *Silverthorne* qualifies as a bad-faith violation under our test for bad faith.[122] On this view, it is the bad-faith nature of the search in *Silverthorne* that creates a presumption in favor of an unabated exclusionary rule and thus distinguishes *Calandra.*

We view this presumption as rebuttable. There may be reasons why a particular limitation on the exclusionary rule should apply even in the face of bad-faith police conduct. We noted earlier that the exclusionary rule is limited in four general ways.[123] We will address each of these limitations in the context of bad-faith violations.

A. Standing

The Fourth Amendment standing doctrine has had a tortuous history in the Supreme Court.[124] Once viewed as a threshold determination intended to limit the class of litigants to those who were "aggrieved by an unlawful search and seizure,"[125] standing has now become enshrined in the Fourth Amendment itself.[126] As presently conceived, a finding that a defendant has no standing to raise a Fourth Amendment violation means she was not aggrieved and thus suffered no Fourth Amendment violation.[127]

Perhaps the best example of the Supreme Court's current position on the question of standing is *United States v. Payner*,[128] a case that we used earlier as an example of a bad-faith search.[129] The district court opinion in *Payner* discloses that the government concocted an elaborate scheme to obtain records of depositors in a foreign bank.[130] This scheme included introducing a female private detective to a male bank official who frequently traveled to the United States

121. *Silverthorne*, 251 U.S. at 391.

122. *See supra* notes 93-97 and accompanying text.

123. *See supra* notes 6-11 and accompanying text.

124. *See, e.g.*, 4 LAFAVE, *supra* note 12, § 11.3.

125. Jones v. United States, 362 U.S. 257, 260-61 (1960) (quoting the then-current version of FED. R. CRIM. P. 41(e)), *overruled by* United States v. Salvucci, 448 U.S. 83 (1980).

126. *See* Rakas v. Illinois, 439 U.S. 128, 140 (1978) (noting that whether a criminal defendant may exclude evidence obtained during a search and seizure turns on whether that search and seizure has infringed an interest of the defendant that the Fourth Amendment was designed to protect).

127. *Id.*

128. 447 U.S. 727 (1980).

129. *See supra* notes 61-64 and accompanying text.

130. United States v. Payner, 434 F. Supp. 113, 118-20 (N.D. Ohio, 1977), *aff'd*, 590 F.2d 206 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980).

carrying bank documents in a briefcase. When the bank official subsequently made a trip to the United States, he went to the detective's apartment.[131] The bank official left his briefcase at her apartment while they went to dinner. A government informant entered the apartment and took the locked briefcase to a locksmith who had been recommended by the IRS. The locksmith made a key for the briefcase, the briefcase was opened, and over 400 documents were removed and photocopied. The copies were introduced in the criminal trial of Payner, one of the depositors.[132] Payner lacked traditional standing to contest the search because the activity had not invaded any area in which he had an expectation of privacy.[133] Nevertheless, the district court ruled in Payner's favor, finding both a flagrant violation of the Fourth Amendment and, as we noted earlier, intent on the government's part to exploit the standing exception to the Fourth Amendment.[134]

The Supreme Court reversed.[135] Because the defendant lacked standing, the Court held that the intent of the government actors was simply irrelevant.[136] The Sixth Circuit, in affirming the district court's decision, had relied on the supervisory power of federal courts, rather than the Fourth Amendment.[137] In reversing, the Supreme Court wrote, "Were we to accept this use of the supervisory power, we would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing."[138]

Yale Kamisar has concluded that the *Payner* Court "never really spoke" to the issue of whether a narrow exception to the standing doctrine should exist for flagrant violations, because the Court "never really asked this question."[139] While this may be true, *Payner* suggests what the Court's answer to that question would have been. The Court analogized the supervisory power question to the related Fourth

131. The district court pointedly remarked, "What occurred at her apartment, if anything, was not brought out at trial." *Id.* at 119.

132. *Id.* at 123.

133. *Id.* at 126.

134. *Id.* at 131-33.

135. Unites States v. Payner, 447 U.S. 727 (1980).

136. *Id.* at 731-32.

137. United States v. Payner, 590 F.2d 206, 207 (6th Cir. 1979), *rev'd*, 447 U.S. 727 (1980) (per curiam) ("Since we base our decision upon the exercise of supervisory powers, it is not necessary to reach the constitutional questions raised on the appeal.").

138. 447 U.S. at 737.

139. Yale Kamisar, *Does (Did) (Should) the Exclusionary Rule Rest on a "Principled Basis" Rather Than an "Empirical Proposition"?*, 16 CREIGHTON L. REV. 565, 638 (1983).

Amendment issues.[140] The Court also explicitly stated that the defendant's due process argument, even if premised on outrageous government conduct of the kind seen in *Rochin*, was equally flawed by lack of standing.[141] The *Payner* decision thus seemed to indicate that a defendant could never suppress evidence found in a search, no matter how flagrant the Fourth Amendment violation, if the defendant lacked standing to assert the violation.

The *Payner* decision, however, preceded the Court's recognition in *Leon* that when a police officer acts in good faith, application of the exclusionary rule is unnecessary because deterrence is not sufficiently served in good-faith cases.[142] Given this understanding of the relationship between deterrence and the officer's mental state, police bad faith argues in favor of a heightened application of the exclusionary rule to achieve heightened deterrence. The flipside of the *Leon* argument thus suggests exclusion regardless of standing. Abolishing the standing requirement for bad-faith violations creates no systemic costs beyond the loss of evidence, a cost that always attends the exclusionary rule. This loss of evidence would be justified, in our view, if the definition of bad-faith conduct is limited to police conduct that is sufficiently injurious to the interests protected by the Fourth Amendment.

In light of the new understanding wrought by *Leon* of the importance of a police officer's mental state, a court facing a bad-faith case might read *Payner* narrowly to forbid only the use of supervisory powers as a substitute for the Fourth Amendment. Consistent with such a reading of *Payner*, the Fourth Amendment can provide the answer in a bad-faith search case, an answer different from the one the Court found under the supervisory power.[143] In our view, Justice Murphy properly addressed standing in an early bad-faith case when he noted in dissent that to allow the government to use evidence "against parties not victims of the unconstitutional search and seizure is to allow the Government to profit by its wrong and to reduce in large measure the protection of the [Fourth] Amendment."[144]

140. 447 U.S. at 736. The Court characterized its holding as a "reject[ion]" of the use of supervisory powers "as a substitute for established Fourth Amendment doctrine." *Id.* at 736 n.8.

141. *Id.* at 737 n.9.

142. *See supra* note 57 and accompanying text.

143. *See* LAFAVE & ISRAEL, *supra* note 26, at 469 (noting that "if ever a fact situation cried out for recognition of [a broader standing doctrine], *Payner* was it").

144. Goldstein v. United States, 316 U.S. 114, 127 n.4 (1942) (Murphy, J., joined by Stone, C.J., and Frankfurter, J., dissenting). Although neither the *Goldstein* Court nor the dissent characterized the government conduct as bad faith, the dissent noted that the government told the defendants after arrest, "We have watched your telephone; we have

B. Use at Trial

Illegally-seized evidence can be used at trial to impeach a defendant.[145] The Court has noted that to suppress such evidence when it is offered for impeachment would "pervert[ ]" the constitutional shield against the use of illegally-seized evidence "into a license to use perjury by way of a defense."[146] Although this rationale may well justify refusing to suppress impeachment evidence obtained by intermediate Fourth Amendment violations, it is unclear whether it is sufficient to rebut our working presumption that bad-faith violations should never produce admissible evidence.

When a bad-faith violation produces the evidence at issue, the government has unclean hands. The government is asserting an interest in truth-telling at the same time it seeks to introduce evidence obtained by its own immoral conduct. Moreover, by the time of trial, the government's bad-faith conduct will already have been demonstrated in a pretrial hearing to suppress. Sanctioning that demonstrated government misconduct by admitting the evidence would likely be more unsettling to the community than the possibility that a defendant might testify less than truthfully. Thus, the broadly defined interest in preserving governmental integrity would be undermined. Finally, the Court's refusal to apply the exclusionary rule is not the only way to penalize or deter perjury; bad-faith evidence could be suppressed in the initial criminal trial and then admitted in a separate perjury prosecution.[147] This approach would allow the government to address the

watched all these lawyers' telephones; we have had rooms tapped. . . . You have been in this for so many years . . . ." *Id.* at 123. Moreover, the dissent concluded that the motive behind telling the defendants about the extensive wiretapping was "to use the 'taps' to secure other testimony." *Id.* The evident knowledge of the violation, the broad scope of the violation, and the exploitation of the illegally-seized evidence in an attempt to get other evidence suggests bad faith. To be sure, *Goldstein* was not a Fourth Amendment case because the Amendment did not apply to wiretaps in 1942. The defendants' claim was based on the violation of a federal statute, and Justice Murphy's reference to the Fourth Amendment, quoted in the text, was by way of analogy. Analyzed under today's doctrine, however, the federal agents' conduct would constitute a Fourth Amendment violation. *See* Katz v. United States, 389 U.S. 347, 359 (1967) (holding that warrantless eavesdropping of a telephone booth constituted a Fourth Amendment violation). Moreover, we think the violation would likely rise to the level of a bad-faith violation.

145. *See* United States v. Havens, 446 U.S. 620 (1980).

146. *Id.* at 626 (quoting Harris v. New York, 401 U.S. 222, 226 (1971)).

147. A defendant who commits perjury during his criminal trial has committed a wrong against the justice system similar to that of the government actor who engages in bad-faith conduct to uncover evidence designed to prove guilt. As no substantial reason exists to prefer one wrong over the other, the system could adopt a hands-off policy and thus permit use, in perjury prosecutions, of tainted evidence, even if obtained in bad faith.

perjury—a distinct wrong from any underlying crime—without allowing the government to use bad-faith evidence in a prosecution for which the evidence was originally obtained.

Of course, the easy answer to the unclean-hands argument is that the government's immorality took place in the past and the defendant is presently seeking to commit perjury. On this view, the cost of licensing perjury is both real and weighty. This concern seems likely to outweigh any community upset at the use of the evidence obtained by bad-faith methods. In addition, use of impeachment evidence is merely a means of preventing the perjury from having an effect. Assuming the defendant is committing perjury, there is no net cost in terms of damage to judicial integrity by using impeachment evidence obtained through bad-faith conduct, because permitting perjury to go unchecked would damage judicial integrity at least as much as admitting the tainted evidence. On these assumptions, it is difficult to argue that a past governmental wrong somehow justifies permitting the defendant to commit a present wrong.

However, two additional arguments favor the unabated exclusionary rule in the impeachment context. First, if a broadened exclusionary rule provides more deterrence, one would want as few exceptions as possible. It is easier to communicate the message to an officer that no benefits accrue from a bad-faith violation than the message that a bad-faith violation causes the government to lose some, but not all, of the uses it would otherwise have had.

Second, as argued earlier, the flagrant nature of the police conduct that underlies our definition of bad faith suggests at least modest skepticism about the reliability of the connection between the incriminated defendant and the evidence produced by bad-faith conduct. "Truth" is not so easy to determine when the evidence demonstrating guilt was produced by bad-faith conduct. Thus, the moral dilemma of the defendant openly lying while the prosecutor is forbidden to unmask the lie is not so clearly present in bad-faith cases. If a substantial number of bad-faith cases involve manufactured or exaggerated connections, the moral high road that underlies the impeachment exception is eroded, perhaps to the extent that the system should not draw a distinction between the immorality of defendants and that of the government.

The impeachment exception may be the most difficult exception to reconcile with our proposal. However, because deterrence is best served by a broad exclusionary rule, and because our definition of bad-faith conduct entails flagrant violations, we would resolve doubts

in favor of the *Silverthorne* rule forbidding the government from gaining any "advantages" from its "outrage[ous]" conduct.[148] By "advantages," we think the *Silverthorne* Court meant an increased chance of conviction for the crime demonstrated by the seized evidence. This would not include a subsequent perjury prosecution based on testimony at the initial criminal trial. Thus, our proposal would permit the use of bad-faith evidence in this type of perjury prosecution.[149]

C. The Requirement of Criminal Proceedings

The Court has held in a series of cases that the exclusionary rule applies only in criminal or quasi-criminal proceedings, defined as those that seek "to penalize for the commission of an offense against the law."[150] Even within the context of criminal proceedings, the exclusionary rule applies only to the trial and direct appeal. It applies neither to preliminary nor ancillary proceedings, such as investigative grand jury hearings and civil deportation hearings.[151] Nor does it support relief from a conviction in a federal habeas corpus proceedings when the state courts have "provided an opportunity for full and fair litigation of a Fourth Amendment claim."[152]

The rationale for limiting the effect of the exclusionary rule to criminal or quasi-criminal trials and direct appeal is purely deterrence-based. As the Court said in *Calandra*, the "incremental deterrent effect" must be thought to offset the cost of the exclusionary rule before it can be applied in any procedural context.[153] Based on the Court's assessment that police officers worry, to the extent they worry at all, only about loss of evidence at the suspect's criminal trial, only criminal (or, in a few cases, quasi-criminal) proceedings can justify use of the exclusionary rule.[154]

The deterrence calculus changes in two ways when a bad-faith violation is demonstrated. First, the greater harm created by individual bad-faith violations suggests that a smaller incremental deterrent

148. Silverthorne Lumber Co. v. United States, 251 U.S. 385, 391 (1920).

149. We distinguish the situation in the text from a perjury prosecution that follows the bad-faith seizure without an intervening criminal trial. Thus, if the government seizes documentary evidence demonstrating perjury in an earlier setting, that evidence should be subject to the bad-faith exclusionary rule because it is an "advantage" in the *Silverthorne* sense of the term.

150. One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693, 700 (1965).

151. *See* 1 LAFAVE, *supra* note 12, §§ 1.7, 1.10.

152. Stone v. Powell, 428 U.S. 465, 494 (1976).

153. United States v. Calandra, 414 U.S. 338, 351 (1974).

154. *See* LAFAVE & ISRAEL, *supra* note 26 , at 116-17.

effect would justify the application of the exclusionary rule. Second, the premeditated or knowing mental state that would accompany most bad-faith violations makes them particularly susceptible to deterrence. Thus, although the incremental deterrent effect might still be small, it should be larger in the bad-faith category than in the case of intermediate violations, and any gain here seems worth the cost.

Moreover, part of our thesis is that application of the exclusionary rule in bad-faith cases can be justified on grounds other than deterrence. The proportionality principle suggests that the government should pay an additional penalty for its bad-faith conduct, and one way to increase the penalty would be to deny use of the evidence in other proceedings. Governmental integrity is also at risk. To have the government seek a judgment on the basis of evidence seized through bad-faith conduct is bound to erode public confidence in the judicial system.

The primary cost associated with application of the exclusionary rule to other proceedings is the potential for introducing additional procedural complexities. For example, grand jury proceedings and preliminary examinations would almost always precede the filing of a motion to suppress, thus requiring an early determination of police bad faith. Making such a determination would cause at least occasional delay and disruption in the "orderly progress" of these screening procedures.[155] It was this added complexity, balanced against what the Court found to be an insignificant gain in deterrence, that led the Court in *Calandra* to hold the exclusionary rule inapplicable to grand jury proceedings.[156]

The added complexity of holding a hearing on the question of police bad faith in the context of a screening procedure is a real cost, sufficient in our view to justify refusal to extend the exclusionary rule to these preliminary proceedings. However, this complexity cost is much less significant outside the context of screening procedures. For example, it is much less severe in civil proceedings that are designed to produce a final judgment, and it does not arise at all in federal habeas corpus proceedings. In federal habeas proceedings, no additional findings would be required because the record of the initial suppression hearing would provide a basis to review the bad-faith issue. In civil proceedings brought by the government, the bad-faith nature of the violation would have to be litigated, but proceedings of this

155. *Calandra*, 414 U.S. at 349 (discussing significance of delays in grand jury proceedings).

156. *Id.* at 354.

type already contemplate a thorough presentation of the defendant's side of the case. Inquiring into the bad-faith nature of the police conduct is a small cost to pay to achieve proportionality, enhanced deterrence, and governmental integrity. Thus, a bad-faith violation requires application of the exclusionary rule in federal habeas proceedings, as well as any proceeding brought by the government that is designed to reach a final judgment.

Though we agree with the Court that the exclusionary rule should be unavailable in preliminary screening proceedings, that does not mean that the exclusionary rule is necessarily deprived of effect. One way to accommodate the competing interests in this context is to permit the evidence to be introduced in the preliminary proceedings and then dismiss the case later, prior to verdict, if some preliminary stage was tainted by the bad-faith conduct.[157] We envision pre-trial motions (to dismiss the prosecution or suppress or return seized evidence) as the first time that a defendant would be permitted to argue that evidence is tainted by bad-faith conduct.[158] As jeopardy does not attach at this early stage of the process,[159] the government could begin the grand jury process anew, albeit without recourse to the bad-faith evidence. Thus, when we use the term "unabated exclusionary rule," we

157. We think a harmless-error analysis should apply to the dismissal of prosecutions. If it is clear beyond a reasonable doubt that exclusion of the bad-faith evidence would not have changed the result of the grand jury deliberation or the preliminary hearing, the prosecution should not be dismissed. *Cf.* Chapman v. California, 386 U.S. 18, 26 (1967) (holding that a conviction need not be reversed if it is clear beyond a reasonable doubt that the constitutional trial error "did not contribute" to the conviction). Moreover, a conviction at trial, when the bad-faith evidence was not used, would be conclusive evidence that the screening procedures were not tainted by the bad-faith evidence, and no dismissal could be ordered later. This explains the qualifying phrase "prior to verdict" in the text.

158. The Supreme Court has sent mixed signals on the issue of when courts may dismiss indictments. *Compare* Bank of Nova Scotia v. United States, 487 U.S. 250 (1988) (acknowledging power of courts to dismiss indictments based on clear prosecutorial misconduct before grand jury) *with* United States v. Williams, 112 S. Ct. 1735, 1739 (1992) (rejecting "supervisory power" of courts to proscribe rules of prosecutorial conduct, such as mandatory disclosure of exculpatory evidence, before grand juries). Nonetheless, we believe that dismissal of indictments due to bad-faith Fourth Amendment violations is permissible. The *Williams* decision may be nothing more than a *Payner*-type restriction on the use of so-called "supervisory powers" by federal courts. *See supra* notes 137-143 and accompanying text. In addition, the *Williams* Court expressly noted that dismissal of an indictment is permissible when the conduct in question is proscribed by rule, statute or the Constitution. *Williams*, 112 S. Ct. at 1741. Under our proposition, dismissal is required by the Fourth Amendment when the indictment is predicated on evidence obtained by bad-faith government conduct. Thus, bad-faith violations should fit within the category of cases in which dismissal is still permissible after *Williams*.

159. *See* United States v. Sanford, 429 U.S. 14 (1976); Serfass v. United States, 420 U.S. 377 (1975).

mean it to include the right to dismiss a case without prejudice when earlier proceedings were tainted by bad-faith evidence.

D. The Relationship Between Evidence and Violation

The fruit-of-the-poisonous-tree doctrine is the mechanism by which the Court controls how much evidence is tainted by an initial Fourth Amendment violation.[160] The question here is ultimately causal in nature—did the violation cause the evidence to be discovered? The causal connection may be rebutted in three ways. First, the state may prove that the evidence was obtained from an independent source.[161] In that situation, leaving aside the nuances of determining when the source is truly independent,[162] the causal connection between violation and evidence is completely severed. With no causal connection, the bad-faith nature of the violation is not relevant to the question of suppression. Therefore, our proposal would not affect the independent-source doctrine.

A second way of rebutting the causal connection is to find the link "so attenuated as to dissipate the taint" of the original violation.[163] Attenuation analysis focuses on the conduct of the defendant to determine, in effect, if any of her volitional acts constitute an intervening or supervening cause of the subsequent discovery.[164] In this category of cases, the bad-faith nature of the violation is extremely relevant. A unanimous Court has noted that the "purpose and flagrancy of the official misconduct" is "particularly" important to the attenuation analysis.[165] Although the Court did not specify why "purpose and flagrancy" are "particularly" important, we agree with one commentator who has concluded that the deterrence of bad-faith violations "ought to be greater and, therefore, the scope of exclusion

160. *See, e.g.*, Wong Sun v. United States, 371 U.S. 471 (1963) (ruling on whether Fourth Amendment should exclude incriminating statements and formal confessions made after unconstitutional arrests); George C. Thomas III, *The Poisoned Fruit of Pretrial Detention*, 61 N.Y.U. L. REV. 413 (1986) (considering whether exclusionary rule should apply to statements made during unconstitutional pretrial detention).

161. *See* Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

162. *See, e.g.*, Murray v. United States, 487 U.S. 533, 544-51 (1988) (Marshall, J., joined by Stevens & O'Connor, JJ., dissenting) (discussing the difficulty in being certain that a subsequent search was, in fact, independent of the illegal search).

163. Nardone v. United States, 308 U.S. 338, 341 (1939).

164. *See* Brown v. Illinois, 422 U.S. 590, 603 (1975).

165. *Id.* at 604.

broader."[166] This need for broader exclusion justifies a per se rule that no attenuation occurs.

The final method of rebutting a causal link between violation and evidence is the "inevitable discovery" rule.[167] If the police would have found the evidence even if the violation had not occurred, the causal connection is broken, at least in a hypothetical sense. The Court has rejected any role for bad faith in this analysis, noting that suppressing evidence that would have been found in any event puts "police in a *worse* position than they would have been in if no unlawful conduct had transpired"[168] and thus constitutes a disproportionate penalty.

While this point has force, the break in the causal link in an inevitable-discovery case is only a hypothetical break; the police have, in fact, found the evidence by means of a violation. Given the inherently speculative nature of this kind of inquiry,[169] it is almost as if courts permit the government to engage in a kind of make-believe because of "the enormous societal cost of excluding truth in the search for truth."[170] However, as we argued in connection with the impeachment exception, the category of evidence found by bad-faith violations is sufficiently suspect in terms of its connection with the defendant that the truth is not so easily determined. If our skepticism about the reliability of evidence obtained by bad-faith violations is justified, there is much less reason to permit the government to play make-believe when it is guilty of the bad-faith conduct that creates these reliability problems.[171] If one adds in the deterrent value of an enhanced penalty, exclusion is warranted without regard to whether the police would have "inevitably discovered" the evidence, except upon a showing of an actual independent source.

166. Comment, *Fruit of the Poisonous Tree—A Plea for Relevant Criteria*, 115 U. PA. L. REV. 1136, 1151 (1967).

167. *See, e.g.*, Nix v. Williams, 467 U.S. 431 (1984).

168. *Id.* at 445.

169. 4 LAFAVE, *supra* note 12, at 383-84.

170. *Nix*, 467 U.S. at 445.

171. Indeed, in the seminal inevitable-discovery case, the Court found the evidence admissible after stressing that the police conduct "did nothing to impugn the reliability of the evidence in question," *id.* at 446, thus implicitly acknowledging the importance of reliability to the inevitable-discovery analysis. Rather than approach this question on a case-by-case basis as the Court seemed to do in *Nix*, we would adopt a categorical rule about evidence found in bad-faith searches. Given the flagrant conduct that underlies our definition of bad faith, we believe that reason exists to be skeptical in every case of the connection between the incriminated defendant and the evidence that results from bad-faith searches.

Independent-source cases are different in kind from all other potential exceptions to our unabated exclusionary rule because they are the only cases in which the evidence is truly not a fruit of the poisonous tree. Independent-source evidence breaks the casual link between violation and evidence. Therefore, the admission of this evidence should not undermine the deterrent value of our otherwise unabated exclusionary rule.

E. A Summary

Current doctrine permits an officer knowingly to violate the Fourth Amendment while being confident that the evidence obtained may be used to prosecute people who lack standing, impeach a defendant's credibility, prosecute noncriminal cases, or find other evidence. Police officers already have plenty of other incentives to violate the Fourth Amendment, such as preventing a suspect from fleeing,[172] confiscating contraband,[173] and making certain that no one in the vicinity is armed.[174] Without an unabated exclusionary rule, police officers also have evidentiary incentives to commit knowing and flagrant violations of the Fourth Amendment. This result is unacceptable given the societal values underlying the Fourth Amendment.

If our proposal were adopted, the judicial system would inevitably develop an appropriate definition of bad faith in light of the evidentiary consequences of finding bad faith. Societal conventions about police conduct and the uses of tainted evidence would also inform the definition of bad faith. An unabated exclusionary rule for all evidence causally linked to bad-faith violations would cause the bad-faith line to be drawn near the more flagrant end of the spectrum of police conduct, a self-adjusting process that requires a grave violation to justify the severity of the remedy.

In our view, the *Silverthorne* philosophy protects against the unacceptable when evidence is obtained, as it was in *Silverthorne*, through bad-faith methods: "The essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the Court but that *it shall not be*

172. *See* Tennessee v. Garner, 471 U.S. 1, 3 (1985) (finding a Fourth Amendment violation when police halt a fleeing suspect by use of deadly force, unless the "suspect poses a significant threat of death or serious physical injury to the officer or others").

173. *Cf.* Sibron v. New York, 392 U.S. 40, 45 (1968) (stating that officer told suspected heroin addict, "You know what I am after," and then thrust his hand into addict's pocket to retrieve several glassine envelopes containing heroin).

174. *See* Ybarra v. Illinois, 444 U.S. 85 (1979) (finding violation of Fourth Amendment when police frisked several patrons of a bar in a general weapons search).

used at all."[175] While, for better or worse, this mandate has eroded somewhat, it should be resuscitated for bad-faith violations. Under this view, the fruit-of-the-poisonous-tree doctrine extends beyond tainted *evidence*, reaching tainted *uses*. Whenever the government would obtain an advantage that is linked to a bad-faith violation, the exclusionary rule should apply to deprive the government of the advantage. The Fourth Amendment could thereby allow society to feel comfortable in the knowledge that the state can gain no benefit from flagrant misconduct that intrudes on privacy. Either privacy remains intact against such invasions, or the state cannot use the evidence produced by the invasion.

IV. The Procedure for Finding Bad Faith

The Fourth Amendment requires recognition of a category of violations we have called bad-faith violations. Evidence causally linked to a bad-faith violation could not be used. We defined this category of bad-faith violations in terms of four factors, all of which have already been suggested by courts as relevant to suppression determinations. The most important factor is the mental state of the government agent who violates the Fourth Amendment. Premeditated violations would almost always be in bad faith, reckless violations would only occasionally be in bad faith, and knowing violations would produce mixed results. Other relevant factors are the scope and harmfulness of the violation, and the insufficiency of the cause.

The question discussed in this Part is who should decide whether the police have acted in bad faith. In earlier articles, we argued that juries are capable of representing society[176] and should therefore play a greater role in determining what society would deem to be reasonable and unreasonable searches.[177] We have also argued for a complete severance of right and remedy questions in Fourth Amendment procedure, with juries deciding when the police conduct was unreasonable, and judges deciding, on a case-by-case basis, whether suppression should accompany violations found by juries.[178] If our bad-faith proposal were added to this system, judges would have no discre-

175. *Silverthorne*, 251 U.S. at 392 (emphasis added).

176. *See* Thomas & Pollack, *Rethinking Guilt*, *supra* note 1, at 15-27.

177. *See* Thomas & Pollack, *Saving Rights From A Remedy*, *supra* note 1, at 152-63.

178. *Id.* at 182-88.

tion on the suppression question once the jury had found a bad-faith violation.[179]

Whatever the merits of our idea that juries should decide all Fourth Amendment violation questions, juries are particularly well-equipped to decide when police have found evidence through a bad-faith violation. No one can define with any precision what bad faith means without reference to the expectations or conventions of society. It is therefore particularly important to let juries, speaking for society, decide when police have acted in bad faith. As noted earlier, many people distrust law enforcement officers today. Giving juries the power to decree that the police have acted in bad faith is one small, but symbolically significant, way of putting the community in charge of the police.

Some might say that juries already have the power to punish flagrant police violations by ruling against the offenders when civil actions are brought against the police.[180] However, few civil actions are brought by individuals who are found in possession of evidence of a crime, regardless of the gravity of the police violation.[181] The only effective way to deny the government the fruits of bad-faith conduct is to force the prosecutor to run the suppression gauntlet. The community, acting through a jury, would be the best adjudicator.

We do not wish, however, to tie our present proposal to our earlier call for juries to decide Fourth Amendment violations. Under the current system, judges decide when the Fourth Amendment has been violated. It would be easier to implement our current proposal by requiring judges to consider bad-faith claims as part of the suppression hearing. The only additional burden this would place on the suppression judge would be to require her to hear an additional set of arguments and to make an additional ruling on the bad-faith issue.

179. In our earlier Article, we recognized that the severity of a violation could invoke automatic suppression. We explained that trial-level suppression decisions could be reviewed on an abuse-of-discretion standard, and that "[a]n abuse would exist, in our view, if a judge refused to suppress evidence after a violation was found based on evidence that the police acted in bad faith . . . ." *Id.* at 188.

180. *See* 42 U.S.C. § 1983.

181. *See, e.g.*, Spiotto, *supra* note 22, at 269-72. There is, of course, no requirement that civil plaintiffs be found in possession of contraband or evidence of a crime. An unsuccessful search that violates the Fourth Amendment would give rise to liability under § 1983 (and would be more likely to be received favorably by a jury). But we are concerned in this Article only with the question of whether the exclusionary rule should apply more broadly to bad-faith violations of the Fourth Amendment. Thus, the relevant class of criminal defendants-civil plaintiffs for our purposes must have been found in possession of some item of evidence that the state seeks to introduce against them.

The bad-faith ruling would be reviewed in conjunction with the other suppression rulings through the normal appellate process. We do not believe this to be a substantial burden. Furthermore, any burden that is created would be far outweighed by deterring flagrant violations and restoring some community confidence in the criminal justice system.

Society must know that no incentives exist for an officer to intrude excessively on societal privacy by committing bad-faith violations of the Fourth Amendment. Society can best achieve this goal through juries sitting as factfinders in motions to suppress and rendering verdicts on whether violations are bad-faith violations. As no system is currently in place to permit juries to make Fourth Amendment decisions, however, the present system should first be changed to add the bad-faith inquiry to the judicial task of deciding motions to suppress. In either event, the finding of a bad-faith violation should deny the government what Justice Holmes attempted to deny it over seventy years ago: "any advantages that the Government can gain . . . by doing the forbidden act."[182]

Conclusion

Accepting the Supreme Court's justification for the exclusionary rule, courts should use a trifurcated, rather than a bifurcated categorization of violations when deciding whether to suppress evidence obtained in violation of the Fourth Amendment. Presumably, most cases fit within the intermediate category of violations existing between good-faith and bad-faith violations. In this intermediate category, suppression is limited to the state's case-in-chief in the criminal prosecution of the person whose Fourth Amendment rights were violated. The *Leon* good-faith category entails no suppression. Finally,

182. *Silverthorne*, 251 U.S. at 391. Although we would exempt screening procedures and the independent-source doctrine from our expanded exclusionary rule, both exemptions are consistent with Justice Holmes's statement. As we recommend reversal of screening procedures tainted by bad-faith evidence, *see supra* notes 157-159 and accompanying text, the government is not getting any lasting advantage from the use of that evidence in grand jury hearings and preliminary hearings. The independent-source exception is actually implied by the Holmes quote; the government has not gained any advantage by doing the forbidden act if the evidence is obtained from an independent source. The language we omitted from the Holmes quote is "over the object of its pursuit." This language qualifies "advantages that the Government could gain," and thus could imply a standing limitation. Since there was no standing issue in *Silverthorne*, however, we choose to treat that part of the sentence as merely describing the situation before the Court. Whatever Holmes's view of the matter, we would dispense with a standing requirement when the government obtained the evidence by means of a bad-faith search.

the bad-faith exception we propose recognizes the category of flagrant violations from which no advantages can be gained.

Although presumably few searches or seizures fall within the bad-faith category, those that do pose a great threat to the interests protected by the Fourth Amendment. Increased penalties are thus required. Specifically, we recommend the full availability of federal habeas proceedings, the right to suppress in civil actions brought by the government, the removal of the standing requirement and impeachment exception, and broadening the category of suppressible evidence linked to the violation. In short, the shackles should be removed from the exclusionary rule when the government seeks to use evidence derived from bad-faith conduct by government actors.